IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 121/2022
HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

DENNIS SAKALA **1ST APPELLANT**

NEIL KUSEKA **2ND APPELLANT**

MPUNDU MUKUKA **3RD APPELLANT**

AND

ZAMBIA BREWERIES PLC **RESPONDENT**

Coram: Chashi, Majula and Patel, JJA
On 14th June, 2023 and 29th June, 2023

For the Appellant : *Mr. C Ngoma with Mr.B. Stephen, both of Simeza Sangwa and Associates*

For the Respondent: *Ms. M. Monga of Tembo Ngulube & Associates*

J U D G M E N T

MAJULA, JA delivered the Judgment of the Court.

Cases referred to:

1. *First Quantum Mining and Operations Limited vs Obby Yendamoh (SCZ Appeal No. 206 of 2015).*
2. *Zambia Airways Corporation vs Gershom Mubanga (1990 - 1992) ZR 149.*

3. *Kelvin Hang'andu vs Law Association of Zambia (SCZ Judgment No.36 of 2014).*
4. *Peter Mdelemani vs Zambia Engineering Construction Company Limited - Industrial Relations Court Complaint No.95/ 1995*
5. *Shilling Bob Zinka vs Attorney General (1990) ZR 73.*
6. *Zambia China Mulungushi Textile (Joint Venture) Limited vs Gabriel Mwami (2004) ZR 244 (SC).*
7. *Zambia Bata Shoe Company Ltd vs. Damiano Mtambilika (2010) ZR (vol. 2) 244 - 254.*
8. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172.*
9. *Phiri vs Bank of Zambia (2007) Z.R 186*
10. *Violet Nkwanjiwa Nkonjera vs Chilanga Cement Plc SCZ Appeal 33/2007.*
11. *Edward Mweshi Chileshe vs Zambia Consolidated Copper Mines Limited (SCZ Judgment No. 10/ 1996).*

Legislation referred to:

1. *Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.*
2. *The Employment Act, Chapter 268 of the Laws of Zambia.*

1.0 Introduction

1.1 This appeal is against the judgment delivered in the High Court by the Hon Justice Mr. M.K. Chisunka on 12th November 2020.

1.2 The learned Judge dismissed the appellant's claims for discrimination, wrongful dismissal and breach of rules of natural justice that were alleged against the respondent.

2.0 Background

2.1 The appellants were employees of the respondent as production supervisors. On 23rd, 24th, and 25th April, 2007 the appellants supervised shifts that produced soft drinks that were marked with wrong expiry dates, that read '1st January, 2007' instead of '1st January, 2008'. Through this error, the soft drink appeared expired when in fact not. Consequently, a total of 25,602 cases of soft drinks were produced and distributed to various customers.

2.2 The error went unnoticed until 25th April, 2007, when a consumer informed the respondent that it had supplied expired soft drinks. This prompted the respondent to recall the distributed soft drinks from customers and engage casual workers to rub off the wrong dates. The appellants were consequently charged with gross negligence. They exculpated themselves and attended a disciplinary hearing on 7th May, 2007. The appellants were consequently dismissed from employment.

2.3 They eventually appealed unsuccessfully through the respondent's grievance mechanism structures. Some lab technicians who were on duty in the affected shifts were also charged with misconduct, found guilty and penalized with letters of first warning.

3.0 Decision of the High Court

3.1 The learned Judge evaluated the evidence that was before him and identified the main issue for determination as being whether the appellants' dismissal by the respondent was wrongful, discriminatory or contrary to the rules of natural justice.

3.2 On the issue of wrongful dismissal, the trial Judge found that the appellants had failed to lead cogent evidence showing a breach of contract by the respondent in the manner that it dismissed the appellants from employment.

3.3 Pertaining to the claim for breach of rules of natural justice, the Judge began by itemizing the tenets of natural justice in the context of employment matters as articulated in the case of ***First Quantum Mining and Operations Limited vs Obby Yendamoh***[1]. Counsel pointed out that, first an employee must be charged with the alleged offence that he has committed. Secondly, he must be given an opportunity to exculpate himself. Thirdly, the employee must be afforded a fair and impartial hearing and thereafter the right to appeal, if necessary.

3.4 In *casu*, the Judge found that the appellants were charged with gross negligence, exculpated themselves and were found guilty. They were thereafter afforded the right to appeal their dismissal. That this entailed that there was no breach of the rules of natural justice even though there was a typing error

on the date for the letters of dismissal. The court further held that the provisions of **section 26A** of the **Employment Act** did not apply to this case as it only applied to oral contracts.

3.5 Regarding the claim for discrimination, the appellants alleged that they were treated less favourably than the Lab Technicians, Quality Assurance Officers and Electricians who were similarly circumstanced. The learned Judge ultimately found that there was no discrimination on account of the fact that there were material differences in the duties and responsibilities of the appellants when compared to other employees listed above. All in all, the Judge dismissed the appellants' claims.

4.0 Grounds of Appeal

4.1 The appellants were dissatisfied with the decision of the lower court and proceeded to file a notice and memorandum of appeal containing the following grounds of appeal:

1. *The lower court erred in law and fact when it held that the appellants' dismissal was lawful and justified;*
2. *The lower court erred in law and fact when it held that the claim for discrimination on account of being lower rank in status failed and was dismissed.*
3. *The lower court erred in law and fact when it held that the dismissal of the appellants was in accordance with the rules of natural justice.*

5.0 Appellants' arguments

5.1 On ground one, Counsel for the appellants submitted that according to **Halsbury's Laws of England, volume 16(1) 4th edition**, wrongful dismissal is effected at the instance of the employer and is contrary to the terms of employment. It questions whether the dismissal was done in the prescribed manner or not. Counsel submitted that the respondent's disciplinary code provides for a procedure that must be followed when one is faced with disciplinary action (see page 139 of the record of appeal).

5.2 Counsel pointed out that, on 30th April, 2007, the appellants were charged with the offence of gross negligence. On 2nd May, 2007, the appellants received letters informing them that they should attend a disciplinary hearing on 7th May, 2007 which they did. On 8th May, 2007, the appellants were served with letters of summary dismissal dated 4th May, 2007.

5.3 It was contended that the respondent was in blatant breach of its disciplinary procedure. More pointedly, Counsel argued that there was no investigation conducted by the appellant's supervisor and the appellants were never informed in writing of the alleged offences against them after the investigations. That there was no pre-hearing by the Human Resource Department as prescribed by the disciplinary procedure code. The case of ***Zambia Airways Corporation vs Gershom***

Mubanga,[2] was cited where the Supreme Court held that the appellant failed to comply with the correct procedure in the purported dismissal of the respondent.

5.4 Counsel observed that electrical technicians and not the appellants, are the ones who had the duty to input the production and expiry dates in the video jet coding machine. It was contended that the appellants were therefore not grossly negligent in the performance of their work, and were dismissed in breach of the contracts of employment.

5.6 Moving on to ground two, Counsel submitted that the appellants were discriminated against in relation to how they were treated when compared to lab technicians to check the corrections on the date code. That they were given stiffer punishment. The case of ***Kelvin Hang'andu vs Law Association of Zambia*** [3] was referred to where it was held that:

> *"Discrimination can only exist in relation to at least two categories of persons. Discrimination means treating like cases differently or as is claimed in the present case, treating unlike cases the same."*

5.7 It was contended that the appellants and the lab technicians were under similar circumstances but were however charged and punished differently. Counsel asserted that the conduct of the respondent was in breach of **section 108(1)** of the **Industrial and Labour Relations Act** and therefore the

ground should be allowed. To reinforce the submission, Counsel cited the case of ***Peter Mdelemani vs Zambia Engineering Construction Company Limited***[4].

5.8 Finally, on ground 3, Counsel submitted that the dismissal was in breach of the rules of natural justice which dictate that one should be given an opportunity to be heard and the decision maker ought to be impartial. The gist of the appellant's argument on this ground was that the appellants were served with a dismissal letter dated 4th May, 2007 when the disciplinary hearing was held on 7th May, 2007. That this offends the rules of natural justice as the appellants were not given an opportunity to be heard before the dismissal. It was argued that the respondent had already decided to dismiss the appellants before the disciplinary hearing.

5.9 We were implored to allow the appeal.

6.0 Hearing of the appeal

6.1 At the hearing of the appeal Counsel for the appellant relied on the heads of argument that were filed. On behalf of the respondent Ms. Monga indicated that she did not file any heads of argument but would rely entirely on the record of appeal.

7.0 Decision of the Court

7.1 We have carefully scrutinized all the evidence on the record as well as the submission by counsel. The unhappiness by

the appellant stems from the findings by the court below that he was not wrongfully dismissed. Further that rules of natural justice were complied with and that he was not discriminated against. We shall deal with the issue of wrongful dismissal and breach of natural justice together as they are intertwined.

7.2 The question that arises is whether or not the respondent breached the terms of the employment contract in the manner that it dismissed the appellant from employment. It has been contended that the disciplinary code was not followed and this breach must militate against the respondent. We have looked at the disciplinary code and the process that was employed by the respondent. The appellants were notified of the case against them and were given an opportunity to be heard. Following a disciplinary process in which they were subsequently found wanting, they were dismissed.

7.3 In law, there is a requirement to afford an employee an opportunity to be heard before dismissing him or her. We recall the case of ***Shilling Bob Zinka vs Attorney General***[5] where the Supreme Court articulated the principles of natural justice as follows:

> *"Principles of natural justice – an English law legacy – are implicit in the concept of fair adjudication. These principles are substantive principles and are two-fold, namely, that no man shall be a Judge in his own cause,*

that is, an adjudicator shall be disinterested and unbiased (nemo judex in causa sua): and that no man shall be condemned unheard, that is parties shall be given adequate notice and opportunity to be heard (audi alteram partem).

7.4 Another illuminating case is that of ***Zambia China Mulungushi Textile (Joint Venture) Limited vs Gabriel Mwami***[6] where the Court of last resort went on to state as follows:

"Tenets of good decision making import fairness in the way decisions are arrived at. It is certainly desirable that an employee who will be affected by an adverse decision is given an opportunity to be heard."

7.5 It is clear from the foregoing that there is a pre-requisite for an employee to be heard on whatever charges may be leveled against him for the subsequent decision rendered to be considered fair. Turning to the failure of an employer to follow its disciplinary code but having given the employee an opportunity to be heard, the Supreme Court guided as follows in the case of ***Zambia Bata Shoe Company Ltd vs. Damiano Mtambilika***[7]***:***

"With regard to the argument that the appellant failed to tender documentary proof of the respondent's guilt, we note that the Respondent was interviewed on the allegations preferred against him, which were expressly

given on a charge form. He was given an opportunity to exculpate himself which he did. Having followed the rules of natural justice, the respondent cannot, in our view allege and succeed on the basis that the appellant failed to follow its own Disciplinary Code. Besides, there are circumstances, which have shown that it was not prudent to go by the Disciplinary Code."

7.6 It is crystal clear to us that where rules of natural justice have been followed, a claim that the employer has failed to follow its disciplinary code cannot be sustained.

7.7 Turning to the facts of this case, we are in agreement with the trial court that the appellants did not specify which provision had been breached and that the respondent had complied with the disciplinary process which is outlined in its disciplinary code of conduct. It was on this basis that the court came to the inescapable conclusion that the claim for wrongful dismissal was bereft of merit.

7.8 The argument that the letter that was given had different dates and had been drawn prior to 8th May, 2007 was considered by the court which found that the respondent's explanation was plausible and that the appellants had failed to particularise and prove the claim that the decision to dismiss them was made on 4th May 2007 and thus predetermined.

7.9 In our view, the aspect of which day they were dismissed is an attempt by the appellants to grasp at straws or put differently a drowning person clutching at straws. We disagree with the appellant that their dismissal was predetermined.

7.10 We cannot fault this finding of fact by the Judge as has been stated in a plethora of authorities that an appellate court can only set aside findings of fact if they were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts as espoused in the case of ***Wilson Masauso Zulu vs Avondale Housing Project Limited.***[8]

7.11 The court below was therefore on firm ground when it held as it did that there was no breach of the rules of natural justice, neither was the dismissal wrongful. We accordingly find no merit in grounds one and three.

7.12 The grievance in ground two by the appellants is that they were discriminated against and have taken great exception to the trial Judge having found otherwise. As far as the appellants are concerned, they were treated differently from similarly circumstanced persons. The Judge highlighted the provisions of **section 108** of the **Industrial and Labour Relations Act** which deals with discrimination and the onus being on the aggrieved party to establish that they were treated differently in comparison to other similarly circumstanced colleagues. We have also perused the case of ***Phiri vs Bank of Zambia***[9] which held that:

"What we have to decide is whether on the evidence, discrimination was not proved as the learned trial Judge held. We have carefully considered the evidence on this issue. We accept Mr. Mulenga's submissions, and the learned trial Judge's finding that there was no discrimination proved. As Mr. Mulenga rightly submitted, there is no evidence that the other persons who were not discharged also bounced numerous cheques as the Plaintiff did.

As the learned trial Judge quite rightly pointed out, there is no evidence that the breaches by the other persons here were like those committed by the Plaintiff and those others who were not dismissed were similarly circumstanced. The learned trial Judge was on firm ground when he found that the Plaintiff was not discriminated against."

7.13 In order to establish discrimination a party alleging must demonstrate that they were treated differently or less favourably than their fellow employees in the matter. What is of critical importance is establishing also that you were in actual fact similarly circumstanced. The central issue for determination in this regard was whether the other colleagues can be said to have been similarly circumstanced in order for the claim to be sustained. In answering this question, the Judge had this to say at page J18 and page J28 of the judgment:

"The evidence adduced by the complainants themselves demonstrates that there were material differences in the duties and responsibilities of the complainants compared to the Lab Technicians, Quality Assurance Officers and Electricians. Thus, it cannot be said that the Complainants, Lab Technicians, Quality Assurance Officers and the Electricians were comparable in all material respects to warrant them being similarly circumstanced."

7.14 We have also considered and derived guidance from the ***Violet Nkwanjiwa Nkonjera vs Chilanga Cement Plc***[10], where the Supreme Court articulated the following principles:

"It is incumbent on a party alleging discrimination to show that the treatment given to him was less favourable than the treatment given to another person who was similarly circumstanced as him."

7.15 It follows from the above that the onus to prove discrimination lay on the appellants and this onus was to prove on a balance of probabilities that they were discriminated against (see ***Masauso Zulu vs Avondale Housing Project***[8].

7.16 The appellants, merely stating that they were treated differently from others, does not automatically entitle them to succeed on a claim of discrimination. Indeed, there were others that they worked with, who had some role to play with

respect to the end product of the soft drinks appearing with wrong expiry dates. They were given different charges and from the evidence the Judge critically examined the roles of the other individuals who were part and parcel of this unfortunate incident. He came to the irresistible conclusion that they were differences in the duties and responsibilities of the appellants in comparison to the other colleagues. This distinction in the duties and responsibilities does not mean that they were similarly circumstanced. The trial Judge's findings cannot be assailed on this score because he clearly explained how he arrived at his findings. We are further fortified in our conclusion by the case of ***Edward Mweshi Chileshe vs Zambia Consolidated Copper Mines***[1] where the erstwhile Ngulube CJ (as he then was) eloquently stated thus:

> *"However, the attempt to transmute all and any unfairness and all differential treatment or any kind of discrimination whatsoever into social status discrimination will of course continue to be pronounced against. The onus will be on litigants to establish and to demonstrate the existence of reasonable cause to believe that the termination or other penalty or disadvantage was on account of social status. A point needs to be made - and stressed - regarding the discrimination cases: In effect, the rule against discrimination on at least one of the grounds listed in the statute was clearly intended to guard against unwarranted victimisation or*

inexcusable unfairness. The liability of the employer and the entitlement of the employee to a judgment in his or her favour must necessarily depend on the absence of reasonable or just cause, where despite any colourable excuse cited or contractual clause cited, the real, substantial, dominant, or operative reason is the discrimination on one of the grounds. The rule could not have been designed to benefit or to protect workers who are guilty of wrong doing in fact which is sufficient to warrant the termination, penalty or disadvantage inflicted."

7.17 It follows that the respondents were entitled to treat the lab technicians, quality assurance officers and electricians differently as they were not similarly circumstanced owing to what the Judge found to be material differences *"in their job title, description, tasks, duties, responsibilities and ultimately the misconduct they engaged"*. As guided by the apex Court, courts should not accept allegations of discrimination to be conclusive merely because parties have been treated differently.

7.18 For reasons articulated above we accordingly find no merit in the second ground of appeal.

8.0 Conclusion

8.1 In sum, we have found no merit in all the three grounds of appeal and accordingly dismiss them. It being a matter

originating from the Industrial Relations Court Division, employment matter, each party shall bear their costs.

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J. Chashi

COURT OF APPEAL JUDGE

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B.M. Majula

COURT OF APPEAL JUDGE

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A.N. Patel SC

COURT OF APPEAL JUDGE